



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI**

**CAUSE NO 925 OF 2013**

**FARIDA SHAEEN.....CLAIMANT**

**VS**

**HIGHLANDS MINERAL WATER COMPANY LTD.....RESPONDENT**

**AWARD**

**Introduction**

1. Farida Shaeen, the Claimant in this case worked for the Respondent Company as an Accountant. Following the termination of her employment, she filed a claim against the Respondent on 18 June 2013 seeking compensation for unfair termination. The Respondent filed a Response on 25th September 2013 which was amended to include a Counterclaim on 28th February 2014. The Claimant filed a response to the Respondent's Reply and Counterclaim on 18th March 2014.

2. The matter was heard on 19th June 2014 with the Claimant testifying on her own behalf and the Respondent's Deputy Chief Executive Officer and Chief Financial Officer testifying for the Respondent. Both parties then filed written submissions.

**The Claimant's Claim**

3. The Claimant was employed by the Respondent on 3rd January 2011 and as at the time she left employment, she earned a monthly salary of Kshs. 145,000. On 6th December 2012, the Respondent terminated the Claimant's employment stating that the Nairobi Depot where the Claimant worked was closing down on 31st December 2012.

4. The Claimant's claim is as follows:

- a). General damages
- b). A declaration that the termination of her employment was irregular and unlawful
- c). 3 months' salary in lieu of notice.....Kshs. 435,000
- d). Service/gratuity pay.....203,000
- e). Leave pay for 2012.....101,500

f). Salary for December 2012.....145,000

g). Costs and interest

### **The Respondent Response and Counterclaim**

5. In response to the Claimant's claim, the Respondent states that the Claimant was employed as the Accounts Manager, Nairobi Depot between 3rd January 2011 and 31st December 2012. Her appointment was subject to a three months' probation period and her monthly salary at the time of her termination was Kshs. 142,800.

6. The Respondent goes on to state that an independent audit conducted at its Nairobi Depot disclosed a loss of Kshs. 6,779,726 in both stock and cash which loss was attributed to the Claimant and her colleague. It was this loss that informed the Respondent's decision to close the Depot.

7. The Claimant's final dues were not paid to her because she had not cleared with the Company. On 31st January 2013, the Claimant was invited to complete the handover report providing an explanation in relation to the findings of the independent audit. The Claimant however failed to do so.

8. By way of Counterclaim, the Respondent states that in her position as Accounts Manager at the Nairobi Depot, the Claimant was in charge of three staff and reported to the Operations Director in Nyeri. In the year 2012, the Respondent incurred losses at the Nairobi Depot under the Claimant's watch. Following restructuring in the Respondent Company and taking up of Equity Investors in the same year, the Respondent could not sustain the running of the Nairobi Depot.

9. The decision to close the Nairobi Depot was communicated to all the affected employees, including the Claimant at a meeting held on 30th November 2012 which was followed by the requisite termination notices.

10. As a procedure preceding the closure of the Depot, the Respondent called for an independent audit in order to determine the closing balances and the cause of the losses. The audit report on stock movements and cash deposits showed discrepancies in recording of unsold stock, closing stock count and failure to deposit sale proceeds surrendered to the Claimant. The loss arising from failure to deposit cash from sales amounted to Kshs. 5,685,338 while loss from unaccounted closing stock amounted to Kshs. 1,094,388 making a total loss of Kshs. 6,779,726 which the Respondent claims from the Claimant.

11. According to the Respondent, the audit report attributed the losses incurred to acts and omissions in the performance of the Claimant's roles and responsibilities. In line with her responsibilities, the Claimant was expected to clear with the Respondent at the end of her notice period and was thereby expected to render an explanation on the discrepancies highlighted in the audit report.

### **Findings and Determination**

12. The issues for determination before the Court are as follows:

- a) Whether the termination of the Claimant's employment was lawful and fair;
- b) Whether the Claimant is entitled to the reliefs sought;
- c) Whether the Respondent has made out a counterclaim against the Claimant.

### **The Termination**

13. Section 43 of the Employment Act, 2007 provides as follows:

***(1) In any claim arising out of termination of a contract, the employer shall be required to prove the***

***reason or reasons for the termination and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of Section 45.***

***(2)The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.***

14. The Claimant's termination letter dated 6th December 2012 states as follows:

*“I refer to my conversation of November 30th 2012 when I advised you with regret that effective December 31st 2012, we will close the Nairobi Depot.*

*This letter serves as one month notice from November 30th 2012 to you of this closure and also termination of your services with the Company, which is highly regretted.*

*We wish to thank you for the dedicated and tireless services offered by you since January 2011.*

*Kindly liaise with the accounts department to finalize payment of all your dues.*

*We wish you well in your future endeavors.*

*Yours sincerely*

*HIGHLANDS MINERAL WATER CO. LTD*

*ASHWIN K. PADIA*

*CEO”*

15. From the evidence placed before the Court, it would appear that soon after the termination of the Claimant's employment the Respondent discovered through a forensic audit that the Company had lost Kshs. 6,779,726 in un-banked cash and missing stock which the Respondent attributed to the Claimant. On this basis, the Respondent withheld the Claimant's terminal dues.

16. In support of its position on the alleged loss and the Claimant's culpability the Respondent produced an e-mail dated 19th July 2012 from the Chief Financial Officer, Paul Chege to the Claimant and another one dated 14th August 2012 from the Chief Accountant, Nicholas Malei to Paul Chege. From this correspondence, it is apparent that the issue of reconciliation of the Nairobi Depot accounts had caught the attention of management as early as July 2012.

17. Yet, the Respondent appears not to have taken any action until after the Claimant's departure from the Company. In fact there was no mention of any loss in the termination letter issued to the Claimant on 6th December 2012. Indeed from this letter, the only reason the Claimant was required to get in touch with accounts was for payment of her dues.

18. The Respondent made reference to the case of ***Saleh Kiplagat Chebii Vs Centre for African Family Studies (CAFS) [2014] eKLR*** in which **Rika J** sought to make a distinction between handover and clearance stating that while handover is a mere transfer of tools of trade from one employee to another in the interim, clearance is undertaken with finality at termination of employment.

19. While I fully associate myself with the holding of my brother Judge in the ***CAFS Case (supra)***, I do not think it is open to an employer who issues a termination letter with no mention of any pending disciplinary issue against an employee to require the employee to answer charges that were not put to them either during or at the end of their employment. Once an employee leaves the employment of an employer the environment within which a disciplinary inquiry can take place melts away. This does not however bar an employer from pursuing recourse through the criminal or civil justice systems.

20. The Claimant maintains that by the last day of her employment with the Respondent she had fully handed over. First, she periodically made weekly returns to the Chief Accountant through the Chief Executive Officer in Nyeri. Second, she did a final handover to the Respondent's Sales Director, one Mr. Clyde on the instructions of the Chief Executive Officer.

21. The Respondent on the other hand takes the position that the Claimant has not handed over to date and for that reason her terminal dues continue to be withheld. To buttress its position, the Respondent produced an audit report prepared by Delyde Associates dated 25th January 2013.

22. In expressing their view, the consultants stated as follows:

*“Our view is that due to weak controls and ineffective monitoring of stocks at the Nairobi depot, the Company has suffered high losses totaling Kshs. 6,779,726 over the review period.”*

23. My reading of this conclusion is that the loss incurred by the Respondent arose both from systemic weaknesses and human intervention and it was therefore not possible to assign any particular portion of the loss solely to the Claimant. Moreover, there was no evidence that the Claimant was ever involved in the investigations leading to the audit report to enable her to respond to any adverse findings against her. The veracity of the findings were thus not tested and could not be used as a basis to deny the Claimant her terminal dues.

24. Back to the termination. The termination letter is clear and the Respondent confirms that the termination of the Claimant's employment had nothing to do with the Kshs. 6,779,726 loss or any form of misconduct on the Claimant's part. Indeed my reading of the letter is that the termination was driven by what is commonly known as redundancy.

25. Section 2 of the Employment Act, 2007 and the corresponding section in the Labour Relations Act, 2007 define redundancy as:

***“the loss of employment, occupation, job or career by involuntary means through no fault of an employee, involving termination of employment at the initiative of the employer, where the services of an employee are superfluous and the practices commonly known as abolition of office, job or occupation and loss of employment.”***

26. Section 40 of the Employment Act, 2007 sets the conditions to be met by an employer before terminating an employee's employment on account of redundancy as follows:

***a) Where the employee is a member of a trade union, the employer notifies the union of which the employee is a member and the labour officer in charge of the area where the employee is employed of the reasons for and the extent of the intended redundancy not less than a month prior to the date of the intended date of termination on account of redundancy;***

***b) Where the employee is not a member of a trade union, the employer notifies the employee personally in writing and the labour officer;***

***c) the employer has, in the selection of employees to be declared redundant had due regard to seniority in time and to the skill, ability and reliability of each employee of the particular class of employees affected by the redundancy;***

***d) where there is in existence a collective agreement between an employer and a trade union setting out terminal benefits payable upon redundancy; the employer has not placed the employee at a disadvantage for being or not being a member of the trade union;***

***e) the employer has where leave is due to an employee who is declared redundant, paid off the leave in cash;***

**f) the employer has paid an employee declared redundant not less than one month's notice or one month's wages in lieu of notice; and**

**g) the employer has paid an employee declared redundant severance pay at the rate of not less than fifteen days pay for each completed year of service.**

27. In the case of *Francis Maina Kamau Vs Lee Construction [2014] eKLR* this Court held that where an employer declares a redundancy the conditions set out in Section 40 of the Employment Act must be observed and where the employer fails to do so, the termination becomes unfair within the meaning of Section 45 of the Act.

### **Reliefs**

28. In the instant case, the Respondent did not adhere to any of the aforesaid conditions and the Court consequently finds that the termination of the Claimant's employment was unfair and proceeds to award her six months' salary in compensation. In making this award I have taken into account the Claimant's length of service as well as the Respondent's action of withholding the Claimant's terminal dues without any justifiable cause.

29. The Claimant claims three months' notice pay and the Respondent states that the Claimant was given adequate notice and is therefore not entitled to any pay in lieu of notice. The claimant's termination letter dated 6th December 2012 made reference to a conversation held between the Claimant and the Respondent's Chief Executive Officer, Ashwin K. Padia on 30th November 2011 during which the Claimant was informed of the imminent closure of the Nairobi Depot where she worked.

30. As a result, the Respondent claims that the effective date of the Claimant's termination notice was in fact 30th November 2012. I disagree. In *Thomas De La Rue (K) Ltd Vs David Opondo Omutelema [2013] eKLR* the Court of Appeal held that in cases of redundancy there are two notices to be issued; first there must be a general declaration of redundancy and second a specific notice of not less than one month must be issued to each employee affected by the redundancy.

31. Additionally, I hold the view that a termination notice which heralds loss of employment and livelihood cannot be issued casually in a general conversation; it must be issued specifically and in writing. From the foregoing, the Claimant's termination notice began to run from 6th December 2012 when the letter was issued to her and the notice thus fell below both the provisions of her employment contract and Section 35(1) of the Employment Act. The Claimant is therefore entitled to one month's salary in lieu of notice. The claims for leave pay and salary for December 2012 are admitted and are thus payable. The claim for service/gratuity was however not proved and is dismissed.

### **Counterclaim**

32. The Respondent claims the sum of Kshs. 6,779,726 from the Claimant by way of counterclaim. However in view of the fact that the Respondent did not involve the Claimant in the investigations leading to the adverse findings made against her in the independent audit report, the Court finds that the counterclaim is not supported by any tested evidence. The same therefore fails and is dismissed.

### **Final Award**

33. Ultimately I make an award in favour of the Claimant in the following terms:

- a) 6 months' salary in compensation for unfair termination.....Kshs. 870,000
- b) 1 month's salary in lieu of notice.....145,000
- c) Leave pay  $145,000/30 \times 26.5$ .....128,083

d) Salary for December 2012.....145,000

**Total.....1,288,083**

34. The Respondent will meet the costs of this case. The award amount shall attract interest at court rates from the date of the award until payment in full.

Orders accordingly.

**DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 29TH DAY OF OCTOBER 2014**

**LINNET NDOLO**

**JUDGE**

**Appearance:**

Mr. Mutemi for the Claimant

Ms. Ajiambo for the Respondent